SUPREME COURT

OF THE UNITED STATES.

THE PACIFIC MAIL STEAMSHIP COMPANY, (a Foreign Corporation, and owners of Steamship "Golden Gate,") FORBES & BABCOCK, California, Agents, Plaintiffs in Error, *vs.* WILLIAM H. JOLIFFE, Defendant in Error.	No. 202. *Mr. Eaton's Points for Plaintiffs in Error.*

D. B. EATON, on behalf of the plaintiffs in error, submits the following abstract of facts, points and authorities:

ABSTRACT, &c.

The record (original declaration or complaint) alleges—

(1.) That the defendant in error was a regularly appointed and licensed pilot for the port and harbor of San Francisco, under a pilot act of the State of California, approved May 20, 1861. (Fol. 1.)

(2.) That when the steamer Golden Gate was going to sea, Nov. 1, 1861, from the port of San Francisco, "the plaintiff "*first* offered his services to the master, &c., to pilot said "steamship," &c. (It is not alleged he was the *first* pilot that offered service to the steamship.)

(3.) That the master of the steamship declined said offer of service, &c., whereby it is claimed a right of action accrued to the defendant in error for half pilotage.

(4.) The Pacific Mail Steamship Company owned said steamship, and that under the 22d section of said act, the steamship, furniture, &c., and master and owners, are liable for pilotage. (Fol. 2.)

(5.) That under the 24th section of said act, the defendant in error was entitled, upon all vessels over 150 tons and under 500 tons burden, at the rate of $3 50 per foot draft, for half pilotage, when an offer of service has been declined; and on all vessels over 500 tons to an addition of four cents per ton, registered measurement. (Fol. 2.)

(6.) That the steamship then drew 15 feet water, and registered 2,057 tons, which entitled the defendant in error to recover on her draft $52 50, and on her tonnage $41 34, in all, to $93 84. (Fol. 2.)

The answer to the plaintiffs in error in the court below, alleges—

(1.) A denial that the defendant in error was a regularly licensed pilot, &c., in November, 1861, for the port or harbor of San Francisco, and a denial of any right of action or recovery on his part against the plaintiffs in error.

(2.) A denial of liability on the part of the plaintiffs in error, or said steamship, for any pilotage fees to the defendant in error, under the said statute of the State of California, or any other statute. (Fol. 5.)

(3.) That since January 1, 1852, said steamship has been and then was, an American steamship, duly registered at the Custom-House in the City of New-York, and was owned by the plaintiffs in error. (Fol. 5.)

(4.) That the plaintiffs in error are, and have been, since 1848, a corporation duly incorporated under the laws of the State of New-York, and that all the stockholders are citizens

and residents of the State of New-York; that its principal office for the transaction of its business has always been in the City of New-York, with agencies at Panama and San Francisco; and its business is the transportation of passengers and property between New-York and San Francisco, by way of Panama. (Fol. 5.)

(5.) That said steamship has always been propelled by steam, and engaged in navigating the ocean between San Francisco and Panama, and the plaintiff is a citizen and resident of California.

(6.) The act of Congress of the 30th August, 1852, to provide for the better security of the lives of passengers, is pleaded in defence, and its provisions set forth, so far as applicable to the matters put in issue. (Fol. 6.)

(7.) That the defendant in error has never been licensed as a pilot under said act of Congress, or by inspectors thereunder appointed, and that he never qualified or acted as a pilot under said act, or complied with its terms. (Fol. 7.)

(8.) That said steamship is a "vessel propelled by steam," within the meaning of said act of Congress, and was, at the time referred to in the bill of complaint, engaged in "carrying passengers," within the meaning of said act. (Fol. 7.)

(9.) That the compensation claimed, and the right to demand the same, as set forth by the defendant in error, arise solely under the said act of the State of California, passed 20th May, 1861, &c., and entitled "An act to establish pilots and pilot regulations for the port of San Francisco," and that said act is unconstitutional and void, as a violation of the Constitution of the United States. (Fol. 7.)

(*a.*) Because the 24th section of said act makes an unjust discrimination as to rate of whole and half pilotage, as between vessels coasting between the ports of California only, and those coasting between the ports of California and the ports of other States; the former class of vessels being exempt from charge for pilotage, but the latter class being subject to the pilot charges imposed by said act.

(*b.*) Because, by the 24th section of said act, an unjust discrimination is made as to pilot charges in favor of vessels engaged in the whaling trade, and against other vessels trading between a port of California and any other port out of said State. (Fol. 8.)

(*c.*) Because, for other reasons than those particularly specified, the said act of California is unconstitutional and void, as being repugnant to the provisions of the Constitution of the United States. (Fol. 9.)

Upon the issues thus made in the pleadings, the case went to trial in the Justices' Court of the 2d township of California.

That court rendered judgment on the 30th November, 1861, in favor of the defendant in error and against the plaintiffs in error, for $93 84 damages, and for $4 65 per centage, and for $8 costs. (Fol. 12.)

From that judgment the plaintiffs in error took an appeal to "the County Court of the City and County of San Francisco," on questions of law and fact. (Fol. 11.)

The appeal having come on regularly for hearing in the last named court, on the 19th day of February, 1862, (fol. 17,) it was there regularly tried by the court, (sitting as a jury as well as a court,) but without a jury; a jury trial having been expressly waived by the counsel for the parties, according to the practice of said County Court. (Fol. 14.)

In accordance with the practice of the last named tribunal, the court decided and stated its conclusions of fact and law separately, and they are as follows: (Fols. 14 to 17.)

1*st.* That on the first day of November, 1861, "the plain-
"tiff was a regularly appointed, licensed and qualified pilot,
"under a license issued by the Pilot Commissioners for the
"port and harbor of San Francisco, under an act of the legis-
"lature of the State of California, entitled 'An act to estab-
"lish pilots and pilot regulations for the port of San Francisco,'
"approved May 20th, 1861.

"2*d.* That on the first day of November, 1861, the plaintiff
"was not, nor was he at any time, a regularly appointed or
"licensed, or qualified pilot, under a license issued by the in-
"spectors, or any of them, provided for by a certain statute

"of the United States, entitled 'An act to amend an act en-
"titled an act to provide for the better security of the lives of
"passengers on board of vessels propelled in whole or in part
"by steam, and for other purposes,' which was enacted by the
"Senate and House of Representatives of the United States of
"America, in Congress assembled, on the 30th day of August,
"A. D. 1852.

"*3d.* That plaintiff, as a regularly appointed pilot, under
"the act of the Legislature of the State of California aforesaid,
"and whilst attached to the pilot boat 'Fanny,' on said first
"day of November, 1861, offered his services to the master
"of the steamship 'Golden Gate,' then being in the port of
"San Francisco, and about to proceed to Panama, New-
"Grenada, to pilot the said steamship to sea.

"*4th.* That the master, then and there in charge of the said
"steamship, declined the services of the plaintiff as pilot, un-
"der said offer, no pilot licensed under aforesaid State statute,
"and no pilot licensed under aforesaid United States statute,
"then being on board, and the plaintiff being the first State
"pilot who offered his pilotage services.

"*5th.* That the said steamship 'Golden Gate,' at the time
"she was so spoken by the plaintiff, was outward bound from
"the port of San Francisco to the port of Panama, New-
"Grenada, and that F. R. Baby was master of said steamship.
"That at same time said steamship 'Golden Gate' was, and
"ever since the first day of January, 1852, has been, an
"American ocean steamship, duly registered at the Custom-
"House in the port of New-York, State of New-York, and
"exclusively employed in navigating the ocean, and carrying
"passengers and treasure between the port of San Francisco,
"California, and the said port of New-York, by way of Pana-
"ma; was of 2,067 tons, and was owned by the Pacific Mail
"Steamship Company, and that she drew fifteen feet of water,
"when bound on the voyage aforesaid.

"The conclusion of law, from the foregoing facts, is, that
"the plaintiff is entitled to judgment against the defendants,
"the Pacific Mail Steamship Company, (but not against the
"defendants, Forbes & Babcock, or either of them,) as owners
"of the said steamship, for half pilotage, in the sums of fifty-
"two 50-100 dollars, being at the rate of $3 50 per foot draft,

" and forty-one 34-100 dollars, being at the rate of two cents " per ton, registered measurement, making a total sum of " ninety-three 84-100 dollars, and costs, under the 24th sec- " tion of said State statute, of the 20th May, 1861, because " this court is of opinion that said statute of the State of Cali- " fornia is not, as claimed by the defendants in their answer " filed herein, and upon the argument of this cause, in any- " wise at variance with or repugnant to any of the provisions " of the Constitution of the United States; and because, fur- " ther, this court is of opinion that said statute of the State of " California is not, as claimed by the defendants in their " answer filed herein, and upon the argument of this cause, " in anywise at variance with or repugnant to any of the " provisions of the aforesaid statute of the United States, " but, on the contrary, is a constitutional, legal and valid en- " actment."

Upon this finding and decision, a judgment was entered according to the practice of the County Court, in favor of the defendant in error, and against the plaintiffs in error, for the principal sum of ninety-three 84-100 dollars, and for eleven 50-100 dollars costs; and then the judgment further proceeds as follows:

" Because it is the judgment of the aforesaid court, that a " certain statute of the State of California, entitled, ' An act " to establish Pilots and Pilot Regulations for the Port of San " Francisco,' approved May 20th, 1861, is not, as claimed by " the defendants, in their answer filed herein, and upon the " argument of this cause, in anywise at variance with or re- " pugnant to any of the provisions of the Constitution of the " United States; and because, further, it is the judgment of " the aforesaid court, that said statute of the State of Cali- " fornia is not, as claimed by the defendants in their answer " filed herein, and upon the argument of the cause, in anywise " at variance with or repugnant to any of the provisions of the " statutes of the United States, entitled ' An act to amend an " act entitled an act to provide for the better security of the " lives of passengers on board of vessels propelled in whole " or in part by steam, and for other purposes,' enacted August

"30th, 1852, but, on the contrary, is a constitutional, legal and "valid enactment." (Fol. 18.)

This record of the court of final jurisdiction in said cause, in the State of California, has been duly removed to this court by writ of error, and the defendant in error has been duly cited to appear in this court. (Fols. 20, 21, 22, 23, 24.)

POINTS.

I. The judgment of the said County Court, appearing in the record, is a final judgment in the suit in the highest court of law (or equity) in which a judgment or review could be had in the cause in any court in the State of California.

U. S. Judicial Act, 24th Sept., 1789, § 25.
Almy *v.* The State of California, 24 *Howard*, 169, 173.
Constitution of California, Article Sixth.
Harrison *v.* Green, 18 *California R.* 94.
Statutes of California, 1854, p. 92, § 347, § 359.
Adams *v.* Wood, 8 *Cal. Rep.* 314.
Conant *v.* Conant, 10 *Cal. Rep.* 253.
Simmons *v.* Brainard, 14 *Cal. Rep.* 278.
Ex parte Knowles, 5 *Cal. Rep.* 301.
Doyle *v.* Seawall, 12 *Cal. Rep.* 280.

II. The cause drew in question, and the judgment has decided upon the validity of a statute of the State of California, and the authority thereunder exercised, and has sustained said statute and authority against the plea and allegation that such authority and statute were repugnant to the laws and Constitution of the United States.

And said judgment drew in question the construction of a clause of the Constitution and of the statutes of the United States, and the decision of said case in the court below is against the right and privilege specially claimed by the plaintiffs in error under said clause of the statute and Constitution of the United States.

Therefore, the judgment may be brought here for review by writ of error.

Judicial Act of 1789, § 25.
Martin *v.* Hunter's Lessee, 1 *Wheaton*, 304.
Almy *v.* The State of California, 24 *Howard R.* 169.

III. The Statute of California, passed 20th May, 1861, before referred to, and especially those provisions thereof upon which the judgment is founded, are void, because repugnant to the third clause of the 8th section of the first article of the Constitution of the United States, which says: "Congress "shall have power to regulate commerce with foreign nations "and among the several States, and with the Indian tribes;" and because in conflict with the laws of Congress, enacted relative to pilots and pilotage, in accordance with said Constitutional provision.

(1.) The power to regulate commerce includes the power to regulate navigation; and the regulation of the qualifications of pilots, and their compensation, and of the modes and times of offering and receiving their services, are essential parts of the regulation of navigation. And this regulation by Congress extends within the jurisdictional lines of the several States.

Gibbons *v.* Ogden, 9 *Wheaton*, 1.
Norris *v.* The City of Boston, 7 *How. U. S. R.* 283.
Cooley *v.* The Board of Wardens, &c., 12 *How. U. S. R.* at pp. 316, 317.

(2.) If the case of Cooley *v.* The Board of Wardens, &c., (12 *How.*) could be regarded as leaving the question open for discussion, it would in this case hardly be necessary to consider whether the constitutional power of regulating commerce vested in Congress is exclusive and prohibitory, in that sense which would render the statute of California void, in the absence of any specific legislation by Congress on the subject. For since that case was decided, (in December, 1851,) Congress has further exercised its constitutional power under the clause referred to, by enacting, in the following year, (1852,) a

special law on the subject of pilots and pilotage, the need of which was perhaps rendered more apparent by that decision.

That decision went no further than to declare that "a majority of the court" are of the opinion, that "until further legislative provision shall be made by Congress," the "States "may legislate, &c., and that the mere grant to Congress of "power to regulate commerce, did not deprive the States of "power to regulate pilots," &c.

And the court is careful to add, that the decision does not extend "to the general question, how far regulation of a sub-"ject by Congress may be deemed to operate as an exclusion "of all legislation by the States upon the same subject. We "decide the *precise question* before us, upon what we deem "sound principles, applicable to this particular subject, *in the "state in which the legislation of Congress has left it.* We go "now further:

12 *Howard R.* 320.

The minority of the court held, that the power of Congress to legislate on the subject of pilotage was exclusive, and hence that all State statutes on the subject were void, except in so far as they had been approved, or rather adopted and reënacted by the laws of Congress.

It is, therefore, very evident that this case is no authority on the subject before us, in its position since the subsequent legislation of Congress, regulating pilots and pilotage—except in so far as it may be regarded as affirming the principle, that the mere existence in Congress of an unexercised power to legislate on the subject of commerce and navigation does not of itself render void all reasonable legislation of the States on those subjects.

3. The provisions of the statute of California appear to wholly ignore the authority and duties of the general government in reference to pilots and pilotage at the port of San Francisco, and in principle assert exclusive control thereof.

(*a.*) The title and leading provisions of that act are as follows:

An Act to establish Pilots and Pilot Regulations for the Port of San Francisco. Approved May 20, 1861.

The first ten sections create a Board of Commissioners, &c.

§ 11. "Every pilot of the harbor of San Francisco shall, once in each month, render to the Pilot Commissioners an account of all moneys received by him, or by any other person for him, or on his account, and shall pay ten per cent. on the amount thereof to the said Commissioners, which shall be received by them in full compensation for their official services, for the services of their Secretary, and all the incidental expenses of their office."

"If any pilot shall neglect for thirty days to render such an account, or pay over the ten per cent. above specified, or if he shall render a false account of moneys so received, he may be deprived of his license."

§ 18. "*Any person not holding a license as pilot*, or any person not being attached to a pilot-boat, *approved by said Commissioners*, who shall pilot *any* ship or vessel into or out of the port of San Francisco, by way of the 'Heads,' except such as are exempt by virtue of this act, *shall be deemed guilty of a misdemeanor*, and on conviction in any court of competent jurisdiction, shall be punished by a fine not exceeding $500, or imprisonment not exceeding ninety days."

§ 21. "The pilotage inside the 'Heads' to the anchorage opposite San Francisco and about the harbor, shall be at such rates as shall be agreed upon between the parties."

§ 22. "All vessels, their tackle, apparel and furniture, and the masters and owners thereof, shall be jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction."

§ 24. "The following shall be the rates of pilotage into or out of the harbor of San Francisco: All vessels over 150 and under 500 tons, seven dollars per foot draft; and all vessels over 500 tons, seven dollars per foot draft, and four cents per ton for each and every ton of her registered measurement; *all vessels engaged in the whaling trade, one dollar per foot draft.* When a vessel is spoken, and the services of a pilot are declined, one-half of these rates shall be paid, except when

a vessel is in tow of a steam-tug outward bound, in which case no charge for pilotage shall be made, unless a pilot be actually employed. *All government vessels*, $10 *per foot draft. All vessels coasting between the ports in the State of California shall be exempt from the provisions of this act.*"

§ 25. "All acts heretofore passed, in relation to pilots and pilot regulations for the port and harbor of San Francisco, are hereby repealed," &c., &c.

4. The act of Congress, passed on the 30th August, 1852, (*Statutes at Large*, vol. 10, p. 61,) is a full regulation of pilots and pilotage; and is inconsistent with the California statute, and the latter must be regarded as of no legal effect; and no pilotage fees can be recovered thereunder.

This act of 1852 is entitled "An act to amend an act "entitled an act to provide for the better security of the lives "of passengers on board of vessels, propelled in whole or in "part by steam, and for other purposes."

Some of its provisions are as follows:

The first section of the act declares, that no license, register or enrollment shall issue, until the provisions of the act are complied with; "and if any such vessel *shall* be *navigated* "*with passengers on board*," without complying with the "terms of the act, the owner, and the vessel itself, shall be "subject to the penalties contained in the second section of "the act to which this is an amendment."

The succeeding seven sections relate to precautions against fire, pumps, boats and life preservers, to be taken and carried on board; the means of escape from lower deck, the carrying of gunpowder, camphene, turpentine and other dangerous articles, and the stowage thereof when carried; and then, in the ninth section, the act provides, "that *instead of the exist-* "*ing provisions of law*, for the inspection of steamers and "their equipment, *and instead of the present system of pilot-* "*age* of such vessels, and the present mode of employing "engineers, the following regulations shall be observed, to "wit:"

The collector, supervising inspector and district judge of

the several designated judicial districts, within which are important commercial ports, are to appoint inspectors, who are empowered and required to perform various duties, specified in the subdivisions following; the first six of which provide for the examination and testing the hull and the boilers, and machinery; the certificate of approval, the licensing to carry gunpowder, &c., and the keeping of a record of their certificates and licenses; and the seventh subdivision provides that the inspectors shall license and *classify all* engineers and *pilots* of steamers carrying passengers. The eighth then provides for the examination and licensing of engineers; and the ninth, that "when *any person* claiming to be a skillful pilot "for any such vessel, shall offer himself for a license, the said "board shall make diligent inquiry as to his character and "merits, and if satisfied that he possesses the requisite skill, "and is trustworthy and faithful, they shall give him a certifi- "cate of that effect, licensing him for one year to be a pilot "of *any* such vessels *within the limit prescribed in the certifi-* "*cate.*"

Subdivision ten enacts, that "it shall be *unlawful* for any person to *employ*, or any person *to serve*, as engineer or pilot on *any such vessel*, who is not licensed by the inspectors," and adds a penalty.

And section 38 of the act provides, that *all engineers and pilots of any such vessel* shall, before entering upon their duties, make solemn oath, * * * to be recorded, * * * that he will faithfully and honestly, according to his best skill and judgment, perform all the duties required of him by the act, &c., &c.

And by section 44, all parts of laws *inconsistent* with this act, are repealed. (*U. S. Statute at Large*, vol. 10, Little and Brown's Ed. pp. 61—67.)

(*a.*) The legal question raised on these provisions has arisen upon similar State laws, and has been discussed and decided in the State courts of New-York and South Carolina. The former decision sustains the theory of the plaintiffs in error, and the latter, to some extent, that of the defendant in error.

Chapman *v.* Jackson, 9 *Rich. Law R.* (S. C.) 209.
Cisco *v.* Roberts, 6 *Bosworth Rep.* 495.

The South Carolina decision succeeds one in the courts of the same State, not quite in harmony therewith.

Chapman *v.* Miller, 2 *Spear R.* 769.

The New-York decision was made in the Superior Court of the City of New-York, and the opinion of Judge Woodruff contains a full and able discussion of the subject.

Dryden *v.* The Commonwealth, 16 *B. Monroe Rep.* 598.
Edwards *v.* Steamship Panama, 1 *Oregon Rep.* 419.

(5.) Even if it were conceded that the act of 1852 had important reference to securing properly qualified pilots for the sea voyage, who should be skilled in the management of the machinery, &c., it cannot be denied that such skill would be quite as much needed in navigating the narrow channels and the shoals near the harbors, and on the coasts. And the express and unequivocal language of the statute, as well as the security of the ship and passengers, *require* a pilot for such navigation who has been able to pass, and who has actually passed the examination required by the statute, and been licensed by the commissioners thereunder appointed by Congress. Indeed, the 2d section of the statutes prohibits *any navigation* by any pilot, not licensed according to the law of Congress; and to take a vessel into or out of port as a pilot, is *to navigate* her.

12 *Howard's Rep.* 316.

(6.) As declared by Chief-Justice Marshall, (Gibbons *v.* Ogden, 9 *Wheaton R.* p. 207, and repeated in Cooley *v.* Board of Wardens, &c., 12 *Howard*, 322,) "When the government "of the Union was brought into existence it possessed *a sys-* "*tem for the regulation* of its pilots, in full force in every "State." The act of 7th August, 1789, adopted this *system.* This adopted system remained little disturbed until in some particulars modified by the act of March 2d, 1837. (*Statutes at Large*, vol. 5, pp. 153 and 154.) This *system*, thus modified, existed when the act of 30th August, 1852, was enacted.

As if intending, by the most apt and expressive language,

to strike down the old State and amended pilot system, and to substitute a new *system* in its place, Congress, in the 9th section of the act of 1852, uses this language: "That instead of "the *existing provisions* of law for the inspection of steamers "and their equipment, *and instead of the present system* of "pilotage of such vessels, &c., the following regulations *shall* "be observed," &c.

(7.) The decision in the case below was to the effect that no vessel can legally go out of the port of San Francisco without employing, to navigate the ship, (if there is an offer of service,) a pilot *not licensed* under the act of Congress, and is to the effect that the act of Congress imposes no obligation to have steamers piloted into or out of the harbor of San Francisco by pilots licensed according to the provisions of said act of Congress. But the 10th subdivision of the 9th section of said act of Congress declares that "it shall be *unlawful* for any per- "son *to employ or any person to serve* as engineer *or pilot* on "any such vessel who is not licensed by the inspectors, &c., "appointed by said act of Congress," and adds a penalty for a violation of the provision.

(8.) It has been urged against that construction of the act for which the plaintiffs in error contend, (but it would seem rather to apply only to the convenience of its application,) that pilots competent to navigate a vessel in the open ocean might not be competent to take her into or out of a harbor; and that therefore the license required by the act of Congress would be no evidence of the competency of the pilot for harbor navigation, and that the necessity for State pilots and regulations therefore still exist.

This reasoning overlooks important provisions of the act of Congress.

That act provides for "careful examination of applicants for "the privilege of navigating" steam vessels. It does not say that a licensed pilot may navigate a vessel at all times and places. It does not say or imply that it may not be necessary, even where a pilot thus licensed is on board, and has taken the ship to the mouth of a harbor, to employ yet another pilot *thus licensed*, to take her into and out of the port. It only

says, that a pilot *not thus licensed*, shall not pilot such vessel either at sea or into or out of a harbor. This feature of the act appears well illustrated in the 9th subdivision of the 9th section thereof, as follows: "When any person claiming to be "a skillful pilot for any such vessels shall offer himself for a "license," &c., the Board shall make diligent inquiry of his character and skill, &c., and may "license him for one year "to be a pilot of *any* such vessels *within the limits prescribed* "*in the certificate.*"

The "*limits prescribed* in one certificate" may be to pilot *any such vessel* in the open ocean, anywhere outside of any harbor; and the limits prescribed in another certificate may be to navigate any such vessel in and near some particular harbor, according as the candidate, upon his examination, may appear to be qualified. One of the objects of the examination is to ascertain and certify for what sphere and kind and limits of navigation the applicant is competent.

The force of the reasoning is not easily apprehended, which urges that because an engineer, who is able to successfully pass the rigid examination required by the United States statute, may not be able to navigate the vessel *everywhere*, (and beyond the limits for which his license authorizes him,) as, for example, in the dangerous channels of a harbor; that thereupon and therefore it follows that this dangerous navigation may be undertaken by a person who has not been examined at all, and who would not, perhaps, dare offer himself as a candidate for examination as a pilot for such dangerous harbor navigation, or for any other navigation.

The more satisfactory and logical conclusion from the premises and the reasoning would be that, if one pilot, licensed under said act of Congress, was not capable of taking or authorized to take a steamer into a particular harbor, that some other pilot, duly examined and licensed under said act of Congress for such harbor navigation, should be employed to perform that service.

Can it be denied that the United States Commissioners, under that act of Congress, may legally license pilots to navigate steam vessels into and out of the harbor of San Francisco, and nowhere else, making the harbor "the limits" mentioned in the certificate, under the act cited?

And if so licensed, would not such pilot be competent for the harbor navigation? And would not such pilots take precedence of and supersede the State pilots? Could the law of Congress and the State law and their respective commissioners and pilots, appointed under each, both remain in full force and co-operation, and if not, which must yield?

IV. Conceding, therefore, the fullest scope that can be claimed for the decision in the case of Cooley, &c., 12 *Howard*, the plaintiffs in error insist that the law of California, referred to in the pleadings, is void, for repugnance to the pilot law of Congress, enacted in 1852. In Cooley's case, 12 *Howard*, at page 321, Mr. Justice Curtis, who delivered the opinion of the court, declared the act of Pennsylvania valid, only because "it does not interfere with any *system* which Congress has "established," &c.

Congress has, since that decision, and in the law last referred to, established a system which it has declared to be "*instead of the present system*," &c. The whole reasoning of that case is to the effect, that so far as the legislation of Congress may at any time go, on the subject of pilot regulation, it must be regarded as a part of the regulation of commerce, under the Constitution of the United States, and be treated as excluding and nullifying all State legislation covering the same ground.

D. B. Eaton,

Of Counsel for the Pacific Mail Steamship Co.,

Plaintiffs in Error.

In the Supreme Court

OF THE

UNITED STATES.

DECEMBER TERM, 1864.

THE PACIFIC MAIL STEAMSHIP C

PLAINTIFF IN ERROR,

VS.

WILLIAM H. JOLLIFFE,

DEFENDANT IN ERR

BRIEF OF GREGORY YALE,

For Defendant in Error.

SAN FRANCISCO:

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IN THE SUPREME COURT

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THE PACIFIC MAIL STEAMSHIP COMPANY (a Foreign Corporation, and owners of Steamship "Golden Gate," Forbes & Babcock, California Agents),

Plaintiffs in Error,

versus

WILLIAM H. JOLIFFE,

Defendant in Error.

MR. YALE'S POINTS FOR DEFENDANT IN ERROR.

The complaint is framed upon the Act of the State of California, of the twentieth of May, 1861, entitled "An Act to establish Pilots and Pilot Regulations for the Port of San Francisco." (Session Acts, 594.)

The action was commenced in a Justice's Court, for the sum of ninety-three dollars, against the

corporation known as the Pacific Mail Steamship Company, for half pilotage.

The twenty-fourth section of the act provides:

"When a vessel is spoken, and the services of a Pilot is declined, one-half of the rates shall be paid, except when a vessel is in tow of a steam tug outward bound, in which case no charge for pilotage shall be made, unless a Pilot be actually employed; all Government vessels, ten dollars per foot draft; all vessels coasting between the ports in the State of California shall be exempt from the provisions of this act."

The twenty-second section of the act provides that "the vessels, their tackle, and furniture, and the master and owners thereof, shall be jointly and severally liable for pilotage fees, to be recovered in any Court of competent jurisdiction."

Judgment was rendered for the plaintiff after appearance by counsel for defendant, and answer filed. (Record, pages 2 and 7.)

An appeal was taken from this judgment to the County Court, and, after argument, affirmed. (Record, pages 7, 8, and 9.)

The amount involved being within the sum fixed for the jurisdiction of the Supreme Court of the

State on appeal, a direct appeal was made to this Court, under the twenty-fifth section of the Judiciary Act, claiming an exemption from pilotage under the Act of the thirtieth of August, 1852, entitled "An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam and for other purposes."

This Court, at the last term, intimated that, as the constitutionality of the Act of the twentieth of May, 1861, was involved, the case would be reserved till the State was represented. J. G. McCullough, Esq., has filed a Brief in behalf of the State, and D. B. Eaton, Esq., has filed a Brief for the Pacific Mail Steam Ship Company.

The first point made by the Attorney-General of the State is, that by an Act of the Legislature of California, of the fourth of April, 1864, the Act of 1861, and all other acts relating to Pilots and Pilot regulations, are repealed, without any reserving clause, and consequently this action cannot be enforced.

He desires that the constitutionality of the State pilotage laws should be decided under the Act of 1864, and not under the Act of 1861. There is no case before this Court under the Act of 1864; and as this act was but a revision of the Act of

1861, and similar in its provisions, the same question would be presented under each act. By Sec. 24 of the Act of 1864, it is provided that "when a vessel is spoken and the services of a pilot is declined, one-half of the rates shall be paid." (Session Acts of 1864, page 392.)

It is well understood that this action is intended as a test suit. There is a large sum due the San Francisco Pilots from this company, and other steamship companies, depending upon the termination of this case.

The authorities cited by the Attorney-General to sustain the first point in his Brief, belong to other classes of cases, such as penalties, *qui tam* actions, etc. Norris v. Crocker, 13 Howard, gives the rule, in a case of penalty. The Act of 1850 repealed the fourth section of the Act of 1793, so far as related to the penalty; and there is no vested right in a penalty, until it is recovered, and the Legislature might discharge the defendant by repealing the law.

This is not a case of penalty. An agreement for pilotage service is an express contract, which the repeal of the law under which it was made would not affect. Half-pilotage is a *quasi* contract. It is a charge to which the ship is subjected, when

the service is offered and declined. Whole and half-pilotage stand, in this respect, on the same footing, as contracts. No question has been made upon the validity of State legislation as to the subject of half-pilotage, since the decision of Cooley vs. The Board of Wardens of the Port of Philadelphia, 12 Howard, 312.

Half-pilotage is within the legitimate scope of pilotage regulations. In the case cited, the Court say :—

"We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons

on board at the proper time and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor. and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases, in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one."

The distinction is correctly made in Butler v. Palmer, 1 Hill, 324, one of the authorities cited by the Attorney General. Inchoate rights, generally, derived under a statute, are lost by its repeal, unless saved by express words; but otherwise in respect to civil rights perfected far enough, to stand independent of the statute, where executed.

In the same case the familiar rule is stated, that

enactments are not to be construed as interfering with existing contracts, rights of action, or suits, unless the intent thus to interfere be expressed in the enactment. The Act of 1864 has no reference to existing rights under the Act of 1861, nor to actions pending. An Appellate Court will decide upon the law as it stood when the judgment was rendered in the Court below, and not upon the effect of an enactment after the appeal. State of California vs. McGlynn, 20 Cal. 276.

It is not deemed necessary to examine the authorities cited by the Attorney-General, as they belong to one class. Hartung v. The People, 22 New York, 155, is a capital case, where the punishment was changed after conviction, and held to be *ex post facto*. Sanches v. The People, cited from the same volume, 155, is a similar case, and decided upon the authority of Hartung v. The People. Surtees v. Ellison, 9 Barn. & Cress. 750, simply decides that evidence of a trading which ceased before the 6 Geo. 4, chapt. 16, took effect, will not support a commission of bankruptcy issued after that time. Yeaton v. The United States, 6 Cranch, 281, was a case of forfeiture, and was pending on appeal. The Court held that the sentence below in admiralty was not *res adjudicata*, but that the case was before this Court *de nova*, and that after the repeal or the expiration of a law

a penalty, cannot be enforced, nor punishment inflicted for violations of the law committed while it was in force, unless specially provided for. The case of the schooner Rachel v. The United States, 6 Cranch, 329, involved the same principle.

The repeal of the statute therefore, the action being based on contract, and not partaking of the nature of a penalty or a forfeiture, and the statute itself not excluding existing rights under former enactments, the defendant in error is entitled, if he is otherwise, to recover.

The other Points made by the Attorney-General, will be adopted in this Brief.

ANSWER TO THE BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

No question can be made upon the constitutionality of the California legislation. The only question is, whether the Act of Congress of the 30th August, 1852, 10 Stat. at Large, 61, supersedes the State legislation. It may be conceded that Congress has the supreme power to regulate pilotage, even within the inland waters of a State. Nor is it necessary to place the right of a State upon the ground that an enactment to regulate pilotage

within its own jurisdiction, for the protection of the lives and property of its citizens, comes within the admitted rights of police or inspection laws, with which Congress has nothing to do. It may also be admitted that the regulation of pilotage is within the undoubted right of Congress to regulate commerce, under the express provisions of the Constitution.

The powers conferred upon Congress in certain respects, are dormant till exercised, and can be exercised by the States.

There are but two Acts relating to the subject of pilotage, till the Act of 1852. The Act of the 7th of August, 1789, 1 Stat. 54, adopted the colonial system, and all subsequent legislation by the States, until further provision by Congress:

"All pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

The Act of the 2d March, 1837, 5 Stat. 153, was intended to adjust the difficulties between the New York and the New Jersey Pilots:

"It shall and may be lawful for the master or commander of any vessel coming in or going out.

of any port situate upon the waters, which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding."

The Act of the 8th May, 1792, 1 Stat. 271, exempted pilots from militia duty.

The constitutional questions presented in the answer, and reproduced in the brief of counsel for Plaintiff in Error, are fully discussed and settled by this Court in Cooley's case. The prohibition of discriminating between one port and another, urged in argument as a constitutional objection, has the additional authority in the Wheeling Bridge case. State of Pennsylvania v. The Wheeling and Belmont Bridge Co. 18 How. 433 :

"There are many Acts of Congress passed in exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted

power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation the principal object of the framers of the instrument in conferring the power, would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon Congress, for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it.

The Court are also of opinion that, according to the true exposition of this prohibition upon the power of Congress, the law in question cannot be regarded as in conflict with it."

The Act of 1852, and those of 1879 and 1837, are consistent and harmonious.

There is no conflict by word or intent. The opinion of Mr. Justice Monro, in Chapman v. Johnson, 9 Richardson's Law Reports, is not only directly in point, but the logic would be impaired by an attempt to elucidate it. The decision is not based upon any abstract State rights. There is no political element in the case. The decision was rendered in 1856, and merely decides that the State and Congressional legislation do not conflict.

The ship, in that case, was plying between New York and Charleston, and the pilot of the Charleston Harbor claimed and recovered his half-pilotage, although there was a pilot on board for the voyage, under the Act of 1852.

It is asserted in Brief (page 9) that "the provisions of the Statutes of California appear to wholly ignore the authority and duties of the general government in reference to pilots and pilotage at the port of San Francisco, and in principal assert exclusive control thereof."

This is a misapprehension—

1. Congress has never specially legislated on the subject of pilotage for the port of San Francisco, or any other port.

2. The State has never attempted to ignore any Act of Congress.

3. The State legislation is similar to that of all other States on this subject; and the charge could be made with equal justice against every State in the Union.

The case of Circo v. Roberts, 6 Bosworth's Superior Court Rep., is cited. The plaintiff in the case spoke the ship without the jurisdiction of the State of New York, and without her pilotage grounds. When within the jurisdiction, another

pilot spoke the ship and was taken on board. He was regularly licensed by the Pilot Commissioners, and also under the Act of 1852. This case is not authority. The second pilot was entitled to compensation under the State law. His license from the Inspectors of hulls and boilers, under the Act of 1852, conferred no additional power. The pilots authorized under that act are for the voyage, not for a port. This was the point decided in Dryden v. The Commonwealth, 16 B. Monroe, 598. A Louisville pilot claimed the right to pilot a steamer over the falls of the Ohio at that point. There was a licensed pilot on board under the act of 1852, from *terminus* to *terminus*, from a port above to a port below.

The case of Edwards v. The Steamship Panama, 1 Oregon Rep. 419, turned upon the respective rights of two pilots, one from Washington Territory and the other from Oregon. The act of 1852 was not involved.

These four cases are all the decisions upon the subject, except that of Chapman v. Miller, 2 Spear. 769, which does not differ essentially from Chapman v. Johnson, 9 Richardson.

In the case before the Court, the record shows that the steamer had no pilot on board licensed under the Act of 1852 ; but the defendant in error

does not insist on the legal effect of this fact. He desires a decision on the merits.

If the Act of 1852 superseded State laws on the regulation of pilotage, it being general in its terms, no State law exists, where steam navigation prevails, from foreign or domestic ports. The State system is confined to sailing vessels. As commerce advances and population increases, the security to life and property is diminished. Instead of protection, an immunity is granted to destruction from the cupidity of monopolists. A competent navigator from Panama to San Francisco, with a thousand souls on his ship, might prove an indifferent pilot in a local port. A pilot familiar with the tides, currents, shoals, sunken rocks, and all the dangers to be guarded against for the safety of the ship, in going out or coming into port, may not be the equal of the master of the ship in ocean navigation, where life and treasure are at stake. To unite their duties, ensures public safety—so far as State and Federal legislasion can ensure it.

This is precisely what such legislation was intended to accomplish.

GREGORY YALE,

For William H. Joliffe,

Defendant in Error.

N W Cope
Of counsel

No. 136.

In the Supreme Court of the United States.

THE PACIFIC MAIL STEAMSHIP COMPANY, Etc.,
PLAINTIFFS IN ERROR,

vs.

WILLIAM H. JOLIFFE,
DEFENDANT IN ERROR.

Points of the Attorney-General of California.

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Plaintiffs in Error,

vs.

WILLIAM H. JOLIFFE,

Defendant in Error.

J. G. McCullough, Attorney-General of California, submits the following points and authorities on behalf of the State.

The record is so brief that an abstract of facts is omitted.

POINTS.

I.

The Pilot Law of May 30th, 1861, of California, (Stat. Cal. 1861, p. 594,) under which this suit was

brought, was repealed on April 4th, 1864—the twenty-sixth section of which latter Act reads: "All Acts heretofore passed in relation to Pilots and Pilot regulations for the ports and harbors of San Francisco, Mare Island, and Benicia, are hereby repealed." (Stat. Cal., 1863–4, p. 392.) This action falls with the statute that gave it life. No proceedings can be carried on under a repealed law. It must be considered as if it had never been enacted—as if obliterated from the statute book.

If the previous statute imposed a penalty, though the repeal take place after conviction, it arrests the judgment; if after judgment, the judgment is to be reversed on a writ of error at common law. If the previous statute conferred jurisdiction upon a Court in civil cases, the repeal of it works the same consequence against the civil right, unless there be a saving clause, and there is none here.

Miller's Case, 1 Wm. Black. Rep., 451.

Surtees vs. Ellison, 9 Barn. & Cress., 750.

Key vs. Goodwin, 4 Moore & Payne, 341, 351.

Commonwealth vs. Duane, 1 Binney, (Pa.,) 601, 608.

Butler vs. Palmer, 1 Hill, (N. Y.,) 324, 330.

Com., *ex rel.*, vs. Com'rs of Highways, etc., 6 Pick., (Mass.,) 500, 504.

The Board of Trustees of Ill. and Mich. Canal vs. City of Chicago, 14 Illinois, 334, 335.

And this result follows where a judgment is vacated upon a writ of review, (Lewis vs. Foster, 1 New Hamp., 61,) or upon an appeal in admiralty, (Yeaton vs. United States, 5 Cranch, U. S., 281, 283; Schooner Rachel vs. United States, 6 Cranch, U. S.,

329,) and though in some later cases stress is laid upon the fact that these were appeals in admiralty and opened the case upon the facts and the law, and therefore, there had been no definitive sentence pronounced at the time of repeal, (State vs. Addington, 2 Bailey, S. C., 516, 519,) yet, it will be noticed in the case of the *Rachel* that by the sen-
6 tence of the Court below, the vessel had been sold and the proceeds paid over to the United States, and the Supreme Court made an order of restitution.

And, though on a writ of error at common law, the question is whether the record contains any error, it is said: "This is ascertained by applying the law to the judgment contained in the record, and ascertaining whether the latter is supported by the former," and if the law is repealed, the judg-
7 ment is erroneous, as there is nothing to uphold it.

Hartung vs. The People, 22 N. Y., 95, 99, 102, 108, 109.

Sanchez vs. The People, 22 N. Y. 155.

And if, after "re-examination" under the twenty-fifth section of the Judiciary Act of '89, this Court is of opinion that the judgment in this case is erroneous, it will "reverse" upon the above ground, and let the question of the constitutionality of the California Pilot Laws be raised upon the existing
8 statute.

II.

Upon the merits of the question:

First—It is not urged by the Counsel of the

Plaintiffs in Error, in his law points, that the alleged inequalities of the law of 1861, viz: the exemption from pilotage of all vessels coasting between the ports in the State of California, the reduced charge on vessels engaged in the whaling trade, the increased charge upon Government ves-
9 sels, the half pilotage where the services of a Pilot are declined, the exemption to outward bound vessels in tow of a steam-tug, (§ 24,) the agreed charges upon vessels inside the "Heads," (§ 21,) deprive it of the character and attributes of a law for the regulation of Pilots and pilotage; nor that the disposition of the moneys received (§§ 11, 24) impose upon it any other character.

Cooley vs. Board of Wardens, etc., 12 How. U. S., 312, 313.

10 *Second*—Therefore, it is not urged that the State law of '61 is in conflict with the second and third clauses of the tenth section of Article First of the Constitution, which prohibit the States, without the consent of Congress, from laying any imposts or duties on imports or exports, or tonnage, simply because the charges authorized by this law are pilot dues or penalties and are not embraced within the words imposts or duties on imports or exports, or tonnage duties.

11 12 How., 313, 314.

Third—Nor, for the same reason, can it be urged that this law is in conflict with the first clause of the eighth section of the first Article, which declares that all duties, imposts, and excises shall be uniform throughout the United States.

12 How., 314.

Fourth—Nor that it is repugnant to the fifth clause of the ninth section of the first Article which declares that no preference shall be given to the
12 ports of one State over those of another by any regulation of commerce or revenue; nor shall vessels to or from one State be obliged to enter, clear, or pay duties in another.

12 How.. 314, 315.

Fifth—But the Plaintiffs in Error rely solely upon the ground and insist that the California statute violates the third clause of the eighth section of the first Article, which gives Congress the power to regulate commerce, and is in conflict with an Act
13 of Congress passed in pursuance thereof, entitled "An Act to amend an Act entitled an Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," passed August 30th, 1852, (Stat. at Large, vol. 10, p. 61.)

And, preliminarily, giving full force to the argument of the Plaintiffs in Error, if the Court should be of opinion that the statute of the State of '61, so far as *steam vessels carrying passengers* are concern-
14 ed, is in conflict with the Act of Congress of '52, and consequently, that the judgment in this case should be reversed; still, it will not be held that the State statute, so far as sailing vessels or other vessels not carrying passengers are concerned, is unconstitutional because in conflict with the Act of Congress of '52, for the reason that the latter, by its title, tenor, and whole scope, shows that it applies *only* to steam vessels carrying passengers, and even some of those are excepted. (§ 42.)

III.

Then, is the California statute repugnant to the third clause of the eighth section of the first Article of the Constitution, or to the Act of Congress of '52?

First—The power granted to Congress to regulate commerce is not exclusive in the sense that the State statute is void in the absence of any specific legislation of Congress on the subject matter.

And conceding that this power embraces the regulation of navigation, and further, that the regulation of the qualifications of Pilots, of the modes and times of offering and rendering their services, and the powers they shall possess, and the responsibilities that pertain to them, are regulations of navigation, and therefore of commerce, as laid down in Cooley vs. Board, etc., 12 How. U. S., 315, 316, still, the mere existence, aside from the exercise of the power, does not prohibit the States from acting.

This commercial power does not imply an exclusiveness which denies and forbids, necessarily, and apart from any practical, direct, and actual collision or interference, everything like the power of commercial regulation on the part of the States. And the interference must be unavoidable and essential repugnance.

Neither the terms in which this power is granted nor the nature of the power itself show it to be exclusive. The subjects of this power are not such as to require exclusive legislation by Congress, and most especially is this true of the pilot regulations.

Sturges vs. Crowninshield, 4 Wheat., 122, 193.
Houston vs. Moore, 5 Wheat., 1, 45.
Wilson vs. Blackbird Creek Co., 2 Pet. 245, 252.
City of New York vs. Miln, 11 Pet., 147.
License Cases, 5 How., 579, 580.
Passenger Cases, 7 How., 497, 557.
Cooley vs. Board Wardens, 12 How., 318, 319.

Second—The Act of Congress of '52 is not such an exercise of the commercial power as that it su-
19 persedes the pilot laws of the State.

The diversity of interests are so great, the local necessities of commerce are so different, that it would be very difficult, if not impossible, for Congress to establish an uniform system of pilot regulations throughout the Union. And Congress has never attempted it, but has left the subject almost wholly to the State Legislatures to adopt such rules as were best suited to the local peculiarities of the ports within their respective limits.

20 The different States, at the time of the adoption of the Constitution, had each their own regulations. Congress, so early as August 7th, 1789 (1 Stat. at Large, p. 54,) expressly recognized the power in the States to pass such laws; and adopted the systems of the States. It provided "that all Pilots in the bays, inlets, rivers, harbors, and ports of the United States," should be governed by the then or thereafter enacted laws of the States until "further legislative provision shall be made by Congress."
21 It was brief and comprehensive, and covered the whole subject of Pilots and pilot regulations within the limits prescribed.

The California law only applies to the "port" of San Francisco. These different systems for such bays, harbors, and ports, were made by Congress one system, and, to avoid any conflict between the different parts of this system, or, in other words, between the different States, Congress, on March 2d, 1837, (5 Stat. at Large, p. 153,) authorized the
22 Master of any vessel coming into any port situate on waters that formed the boundary between two States, to employ any Pilot duly licensed by the laws of either. This constituted the only legislation of Congress upon the subject till the Act of '52 was passed.

The Act of '52 does not expressly repeal the Act of '89. Nor does it refer by date or subject matter to the Act of '89. Neither by its title or its provisions, nor by the title or provisions of the
23 Act which it amends, are we justified in drawing the inference that Congress had the Act of '89 in contemplation. The whole scope and purpose of the Act of '52 is different from that of '89. The latter, in the fourth section, adopts the State regulations for ports, harbors, bays, etc., and authorizes the States to further legislate.

The former embraces forty-four sections, the greater portion of which provides minute precautions to be adopted by steamers for the safety of their
24 passengers. Precautions against fire, against carrying camphene, gunpowder, and other explosive articles, except as therein prescribed. Provisions to be made for pumps, hose, life boats and preservers, buckets, floats, axes, safety-valves, plugs, etc.; and Inspectors to see that these requirements are carried

out are to be appointed, and penalties provided for the violations of the Act. The whole subject of Pilots and pilotage occupies but little of the law. And where it is referred to, it is obvious that Con-
25 gress speaks of "Engineers and Pilots" for the whole voyage, and not of harbor Pilots. (See § 9, subdivisions 7, 9, 13, and 15; and §§ 19, 20, and 38.) And subdivision ten of section nine provides, "that if a vessel leaves her port with a complement of Engineers and Pilots, and, *on her voyage*, is deprived of their services, etc., the deficiency may be *temporarily* supplied, etc.;" and section twenty speaks of "the Master, Engineer, Pilot, or owner of any *such* vessel."

26 Besides, the provisions are entirely too lame and defective for a general system throughout the States. As said in the South Carolina case, the license provided by the Act of '52 does not require that the Pilots to be thus licensed shall possess any particular knowledge of the channels, harbors, ports, etc., which they are to enter, and if intended to supersede harbor Pilots, would compel the steamer Pilot, under the penalties of the Act, to take the steamer into a port which he never before
27 entered, and of which he knows nothing, and this would not seem to comport with the general purpose of the Act, as given in its provisions and the title, "to provide for the better security of the lives of passengers."

At any rate, there is no such direct repugnance between the Act of '52 and the California statute as that the latter is superseded by the former.

The State laws are co-operative with Congressional legislation.

28 City of New York vs. Miln, 11 Pet., 145.
Cisco vs. Roberts, 6 Bosworth, N. Y., 507, 516.

Third—An examination of the provisions of the California statute will show that they are appropriate parts of a legitimate system of legislation upon the subject—testing them by the practice of commercial States and countries legislating upon the subject of Pilots and pilot regulations.

Cooley vs. Board of Wardens, etc., 12 How., 299, 307, 308, 312.

29 *Fourth*—The Plaintiffs in Error had no Pilot on board licensed under the Act of '52, while the Defendant in Error was duly licensed under the California statute, (Record, p. 8,) and there could have been no conflict of authority as urged by Plaintiffs in Error between the steamer and harbor Pilot in this case.

IV.

Granting full force to the argument of the Plaintiffs in Error, the partial action of Congress in estab-
30 lishing a system of pilotage for the voyage, strikes down all the various laws of the States for their different ports, and simply leaves the Act of '52. The practical consequences of such a decision would be alarming. For three fourths of a century have the States been creating and building up their Pilot systems—no two of them exactly similar—and in some States different regulations for different ports, as in California. The Act of '52 in no sort of mea-

sure provides for the wants of the States, as shown
31 by their laws. (Referred to *arguendo* in Cooley vs. Board, etc., 12 How., 308.) And, unless forced by a "clear conviction of constitutional duty," this Court will not adopt a construction that must occasion an amount of mischief, past and future, that cannot be contemplated without deep anxiety.

Cooley's case, 12 How., 321.

J. G. McCULLOUGH,
Atty-Gen'l of California.